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IN THE
COURT OF APPEALS OF INDIANA

ALLEN PRICE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-829
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0510-FB-175676

October 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Allen Price appeals his conviction, after a jury trial, of one count of robbery as a class B felony and the sentence imposed by the trial court.

We affirm.

ISSUES

1. Whether the trial court abused its discretion when it admitted a photograph of Price.

2. Whether his sentence is inappropriate.

FACTS

On September 18, 2005, at approximately 9:00 p.m., Patricia Bowen exited a Marsh store in Indianapolis with her groceries. As she loaded them in her vehicle, she saw Price approaching on a bicycle. He stopped about 10 – 15 feet away from Bowen and asked for directions to a particular street. Bowen "pointed" in the direction of the street, and Price "kept approaching her." (Tr. 314). When Price was "about two feet from [her], he pulled out a knife and asked [her] for her billfold." *Id.* Bowen "said no." *Id.* Price then ordered, "Give me your billfold," in a "scary, more forceful" voice, and Bowen "looked at the knife." (Tr. 315). She could see "the razor blade part," "the triangular blade that came out of the box cutter knife." (Tr. 321). Bowen gave Price her billfold. Price rode away on the bicycle.

Bowen went back into the store and called 9-1-1. Bowen reported to the dispatcher having been robbed at knifepoint and described the robber, including the fact

that he had a missing front tooth. Bowen waited in the store in the security office, where she viewed the security tape of the incident. Police officers arrived and took her report.

Thirty-six hours later, Detective Harris interviewed Bowen at her home. Harris showed Bowen a photograph array and asked whether she could identify her attacker. Bowen immediately, and without equivocation, identified Price as the man.

On October 12, 2005, the State charged Price with one count of robbery as a class B felony. The information alleged that "while armed with a deadly weapon, that is: a box cutter," Price took from Bowen her billfold by putting her "in fear or by using or threatening the use of force." (Tr. 21).

Price was tried by jury on August 16, 2006. Bowen testified that, during the incident, she was looking directly at his face because she "wanted to be able to recognize, like, or to identify him if [she] had to." (Tr. 317). Bowen testified that the man was missing one of his front teeth. Bowen identified Price, in court, as the man who approached her with a knife and took her billfold that night. Bowen further testified that she was sure of her identification at the time she identified the robber in the photograph array, that she had a memory that did not "forget faces." (Tr. 354). The photograph array from which she identified Price was introduced into evidence; however, it did not depict the subjects' teeth.

Detective Harris testified that subsequent to the robbery of Bowen, he met with Price and observed his mouth. The following colloquy with the State ensued:

> Q. I'm going to show you what has already been marked as State's Exhibit Number Five. And I am going to ask you what that is a photograph of?

A. That's a photograph of the defendant's mouth with it open, along with a tooth missing.

Q. And does that fairly and accurately depict his mouth the day you saw it and the day that photograph was taken?

A. Yes, it does.

(Tr. 376). The State then offered Exhibit Five – a photograph of Price with his mouth open – into evidence. Price's counsel objected based upon Indiana Evidence Rule 403,[1] arguing that the "danger" of Price's "orange suit being visible outweigh[ed] the relevance of its introduction." The trial court admitted the exhibit over the objection. At the conclusion of the trial, the jury found Price guilty as charged.

The sentencing hearing was held on August 31, 2006. Price testified to his efforts at self-improvement during his incarceration, that Bowen may have been deceitful and not have actually been robbed, and that he had now "put [his] life in the hands of God." (Tr. 485). His counsel asked the trial court to note that despite his criminal history, this was "his first conviction for a violent offense," argued that that this, plus Price's "substance abuse history, and his positive efforts "since being incarcerated" should lead the trial court to "impose a sentence of no more than ten years." (Tr. 486, 487). The State argued the lack of "a single mitigator." (Tr. 487).

The trial court stated that it would impose sentence based upon finding "in aggravation," Price's criminal history, and it specified the following convictions:

- in 1987, driving with a suspended license;

[1] Evidence Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

- in 1992, operating a motor vehicle with a blood alcohol content between .08 and .15 percent, with his probation for that offense being revoked;
- in 1996, criminal conversion;
- in 1996, possession of cocaine as a D felony, with probation thereon revoked;
- in 2000, possession of cocaine as a class D felony, with subsequent violation of probation;
- in 2000, criminal conversion as a misdemeanor;
- in 2001, theft as a D felony in 2001; and
- in 2000, possession of paraphernalia.

(Tr. 488). The trial court then found "in mitigation" that Price had "tried to make productive use of his time and tried to better himself while incarcerated," but gave such "little weight" as a mitigator. (Tr. 489). The trial court then "weigh[ed] aggravators and mitigators" and found "that the aggravating factors significantly outweigh[ed] any mitigating factors," and that "imposition of a sentence above the advisory term [wa]s warranted." *Id.* The trial court ordered Price to serve "a sentence of sixteen years in the Indiana Department of Correction." *Id.*

DECISION

1. Admission of Evidence

The trial court has inherent discretionary power on the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court's decisions in this regard are reviewed only for an abuse of that discretion. *Id.* In the setting of a trial court's decision to admit evidence, an abuse of discretion occurs when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (citing *Carpenter v. State*, 786 N.E.2d 696, 702-03 (Ind. 2003)).

Price argues that the trial court abused its discretion when it admitted the picture of him with his mouth open so as to reveal his teeth. Specifically, Price argues that the picture is one of him "wearing jail garb," "an orange jail uniform," and therefore its display to the jury violated his "presumption of innocence" pursuant to *Estelle v. Williams*, 425 U.S. 501 (1976). Price's Br. at 7. We disagree.

As Price correctly quotes, *Estelle* held that the Fourteenth Amendment prohibits the State from compelling "an accused to stand trial before a jury while dressed in identifiable prison clothes." *Id.* at 512. However, Price then concedes that he "was not compelled to stand trial while wearing jail garb." Price's Br. at 9. Nevertheless, Price asserts that the display to the jury of his photograph "wearing the clothing of a prison inmate prejudiced him in the same way." *Id.*

Price's argument is unavailing because, quite simply, the photograph at issue does not display Price "dressed in identifiable prison clothes." *Estelle*, 425 U.S. at 512. It is true that in the photograph, there can be seen a slight amount of orange on either side of Price's neck. However, the clothing neckline is only seen on either side, not at the front. Other than the color, there is nothing whatsoever to indicate that Price's attire might be "prison clothes." *Id.* The author of this opinion has one shirt, and possibly another, that would appear nearly identical if a photograph of the author were taken from the same perspective.

Price further argues that the photograph was improperly admitted because it is "akin to a 'mug shot' or inmate booking photograph" in that "it depicts him as an arrested and incarcerated person." Price's Br. at 9, citing *Richey v. State*, 426 N.E.2d 389, 394

(Ind. 1981) (photograph in *Richey* not a mug shot). An inadmissible "mug shot" is a photograph showing "information which implies that the defendant has a prior record." *Huffman v. State*, 543 N.E.2d 360, 370 (Ind. 1989), *cert. denied* 497 U.S. 1011, *overruled on other grounds by Street v. State*, 867 N.E.2d 102, 105 (Ind. 1991). The photograph at issue displays nothing more than a close-up view of Price with his mouth open, *i.e.*, nothing to imply that Price has a previous arrest record. Therefore, this argument also fails.

2. Sentence

The Indiana Constitution authorizes "independent appellate review and revision" of the sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* It is the burden of the defendant appealing his sentence to "persuade the appellate court" that his sentence "has met th[e] inappropriateness standard of review." *Id.* at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Price argues that the nature of this robbery and his character do not justify the imposition of the enhanced sentence of sixteen years.[2] As to the nature of the offense, he argues that the robbery was "a brief encounter"; that Bowen "was not physically harmed

[2] The sentence for a class B felony is "between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5.

or injured in any way"; that his weapon was "merely a box knife," which is at the "less dangerous end of the" deadly-weapon "spectrum"; and that he "never brandished" the knife, which was "simply displayed from under a shirt." Price's Br. at 6. Some of these assertions are questionable. Bowen testified that Price "pulled out" the knife. (Tr. 314). Further, she testified that the knife had a razor-edge blade. Moreover, Bowen testified that he was within two feet of her. Thus, the facts of the offense reveal that Price had the ability to inflict serious injury on Bowen during the course of the robbery.

Price also argues that his enhanced sentence is inappropriate in light of his character because his previous offenses were not violent and "did not rise above the level of a D felony and were simple drug or property crimes," and he made constructive use of his time in jail awaiting trial Price's Br. at 7. As to the latter assertion, the trial court recognized it as a mitigating factor, although one not meriting great weight. *See Anglemyer*, 848 N.E.2d at 491 (weight assigned to mitigating factor wholly within discretion of trial court). As to the former assertions, the trial court specifically noted the length of Price's criminal record and the frequency of his convictions, a record of disregard for the law that is remarkable. Moreover, on two occasions his probation was revoked – indicating that the grant of Price's conditional liberty was for naught. Further, despite his multiple convictions, Price was not deterred from breaking the law; rather, he escalated the seriousness of his violation to that of a class B felony offense with the use of a deadly weapon.

Price has failed to persuade us that the sentence imposed is inappropriate in light of the nature of the offense and his character. *Anglemyer*, 848 N.E.2d at 1080.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.